SUPREME COURT, U.S.
SUPREME COURT, U.S.

No. 42

IN THE **42**

Supreme Court of the United States

October Term 1948

AUGUST KLAPPROTT, *Petitioner*

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

ANSWER TO MOTION TO MODIFY JUDGMENT

P. BATEMAN ENNIS
Shoreham Building
Washington, D. C.

W. CLIFTON STONE
Shoreham Building
Washington, D. C.

MORTON SINGER
135 Broadway,
New York, N. Y.

Counsel for Petitioner

WILSON - EPES PRINTING CO. - RE 6003 - WASHINGTON 1, D. C.

CASES CITED

	PAGE
Baumgartner v. United States, 322 U. S. 65	9
Citizens Protective League v. Clark, 155 F. 2d 695	6
Hasselbach v. Mount Sinai Hospital, 173 App. Div. (N. Y.) 89 Piggots Case 5 Reports, 29a Ames' Cases 22	4
Knauer v. United States, 328 U. S. 654	9
Schneiderman v. United States, 320 U. S. 118	9
State of Maine v. Beck, 60 Me. 498	3

IN THE

Supreme Court of the United States

October Term 1948

No. 42

AUGUST KLAPPROTT, *Petitioner*

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

ANSWER TO MOTION TO MODIFY JUDGMENT

Petitioner respectfully urges this Honorable Court to deny and dismiss respondent's motion to modify the judgment entered herein for the following reasons:

Respondent at this late date should not be permitted to introduce new facts *not a matter of record*. The colloquy, between the District Court, and counsel for respondent and petitioner, is not evidence and not a part of the record, and most certainly cannot be considered at this time in an effort to alter or modify the judgment of this Court. *After an illegal confinement for a period of approximately six years,* Petitioner requests, and, what has been directed by this Court, is, that he have his day in Court and be afforded a hearing on the merits.

After the Petition for an Order to Show Cause (R 7) was filed, along with the affidavit in support thereof (R 11),

respondent elected to attack the pleadings by an *Oral Motion to Dismiss* on jurisdictional grounds, rather than permit petitioner to offer evidence in support of the allegations contained in the petition. Respondent at no time, so far as the record shows, has ever denied the facts alleged in the petition or affidavit, and the District Court, accepting the undenied allegations as true, held that petitioner had been guilty of "laches" (R 19); F. R. D. 450.

> "This action was initiated by the defendant more than four years after the entry of final judgment in the original proceedings. This undue delay is imputable entirely to his willful and inexcusable neglect. The action must, therefore, be dismissed because of the defendant's laches * * * *".

It is clearly demonstrated that respondent proceeded on the theory of demurrer, and elected that form of relief, and once having conceded the truth and validity of the allegations in the petition before the Court, cannot at this time, approximately two years later, after a decision reversing its position, come before the Court and ask for an opportunity to do what should have been done originally, i.e., to have considered the circumstances and conditions which surrounded this petitioner during the four and one-half years imprisonment prior thereto, and have afforded him the opportunity to have proven the allegations in his petition.

There is no final pleading before the Court, thus the case has been correctly remanded to the District Court for a trial on the merits, and accordingly the respondent cannot be heard to say that it has lost anything by the fact it is now required to submit to a full dress trial on the merits. It appears to us that Government counsel should welcome that opportunity. Briefly discussing demurrers we refer to McKelvey on Common Law Pleading, 2d Ed. Page 74:

> "Sec. 102. At common law the judgment upon the demurrer was final, i.e., it disposed of the action. If the demurrer was sustained and the pleading demurred

to held insufficient, there was no opportunity for the defeated party to amend and go on with the action. If, on the contrary, the pleading was held good and the demurrer overruled, the party demurring was deemed to have had his chance in Court, and as he had chosen to rely on some defect in the other's pleading instead of answering the facts set forth, final judgment was given against him. 2. It is customary everywhere at the present time for the Courts to allow an amendment in case a pleading is held to be bad on demurrer.

State of Maine v. Beck, 60 Me. 498; Ames' (Cases on Pleading, 19.)

On Page 94, McKelvey has the following to say:
Chapter 11. Dilatory Pleas. Sec. 127.

"The demurrer, it has been seen, was a method by which the defendant could avoid putting in an answer to the merits of the cause of action alleged against him, and obtain a determination of the suit solely upon the plaintiff's statement of the case. The real facts may or may not have constituted a good cause of action, and the defendant may or may not have had a good defense. These questions were immaterial. If the plaintiff had failed to make his cause of action appear upon the face of his declaration, or had drawn such declaration in an informal manner, the defendant, without going into the question of the real fact of the matter, could, by general or special demurrer, defeat the plaintiff's suit. But it was only for a fault which appeared upon the face of the declaration that the defendant could demur. If there were other mistakes which the plaintiff had made in the bringing of his action; or in his declaration, which did not appear on the face of the declaration, the defendant could not take advantage of them by demurrer".

At Page 95, the author continues:

"Sec. 130: Dilatory pleas may be divided into three general classes, in respect to the effect which they have upon the disposition of the action (1) Pleas to the jurisdiction of the Court * * *

> "Sec. 131 (1). The plea of the jurisdiction of the Court was in substance a statement that the plaintiff had commenced his action in the wrong Court, either because the Court had no jurisdiction of the subject matter of the action or of the parties thereto, and that on that account the defendant ought not to be compelled to plead. A judgment for the defendant upon the plea to the jurisdiction was a virtual ending of the suit, as far as the particular Court in which it was brought was concerned."

It must be conceded that demurrers search the record and go back to the very first pleading. That was done in this case by Mr. Justice Black in his opinion, Page 8, where he states that the Amended Rule 60(b) applies, and this is in point with his statement that the judgment is void. McKelvey further states that a demurrer searches the entire record and starts from the first pleading and the first one which contains an error decides the case irrespective of the party who raises it. Thus at Page 87, Sec. 120 McKelvey writes:

> "There was a peculiarity about the demurrer which made it somewhat dangerous for a party to use unless he was perfectly sure that his own pleadings were properly drawn. This peculiarity was the effect which a demurrer had in opening the whole record so that the Court began with an examination of the declaration and took up successively each pleading with respect to its sufficiency and then gave judgment against the party who had made the first mistake without regard to which one had put in the demurrer.
>
> *Hasselbach* v. *Mount Sinai Hospital*, 173 App. Div. (N. Y.) 89 Piggot's Case 5 Reports, 29a Ames' Cases 22."

In analyzing respondent's motion, it appears that it is based solely on the point that the record was barren of the information which it now seeks to argue, but such argument cannot be sustained because on the Motion to Dismiss the petition, the District Court went beyond the question of jurisdiction when it found *Klapprott guilty of laches* and in part stated (R 19) F. R. D. 450 "The action must, therefore,

be dismissed because of the defendant's laches", so the District Court went into the substantive phase of the case in denying petitioner relief on the grounds of laches.

Let us carry the respondent's contention a step further, and beyond the question of technicalities. On page 10 of the motion it is stated:

> "But this Court's judgment orders the case remanded to the District Court" with instructions to set aside the judgment by default and grant the petitioner a hearing on the merits raised by the denaturalization complaint". This denies the Government of the opportunity to which it is entitled under accepted principles of procedure to challenge the allegation of the petition". * * * * But the facts set forth in the Petition have not been shown to be true; they have merely been alleged."

The Petition and Affidavit were made part of the record in Appellant's Appendix in the United States Court of Appeals for the Third Circuit, and in the Appendix before this Court, (R 7 to 15). Nowhere in the reply briefs, in the United States Court of Appeals for the Third Circuit or to the Petition for Certiorari, or to Petitioner's Brief in the Supreme Court, has respondent seen fit to deny the allegations alleged in the petition and affidavit, and even now it does not deny their verity. We are constrained to set forth excerpts from the petition and affidavit which the Government should concede as a matter of record namely:

1. That petitioner became an American Citizen.

2. That the certificate of citizenship No. 370-7549 was received by him November 16, 1933.

3. That a short time prior to service of the summons to cancel his citizenship, petitioner was a patient in Christ Hospital, Jersey City, New Jersey.

4. That upon release from the hospital he was in poor health and had made arrangements to live at Camp Nordland until such time as his health improved.

5. That he was served with the complaint on May 15, 1942 while living at Camp Nordland.

6. That before time had expired to answer the complaint, petitioner was indicted by a Federal Grand Jury in New York City, in the case of *United States* v. *Wilbur Keegan et al.*

7. That approximately 8 days prior to expiration of time to answer the complaint he was removed to New York City, N. Y. after appearing before the United States Commissioner, Newark, N. J., waiving removal and held under a bond of $25,000.00.

8. That he was confined in jail in New York City at the time the Assistant United States Attorney at Newark, New Jersey, applied for a default judgment cancelling his citizenship.

9. That he was convicted in the case of *U. S.* v. *Keegan et al.*, and sentenced to 5 years; that the conviction was affirmed on appeal, 141 F. 2d 148, and later reversed by the Supreme Court of the United States 325 U. S. 348.

10. That he was indicted in the case of *United States* v. *Joseph McWilliams et al.*, and removed to the District of Columbia; that the case was subsequently dismissed and affirmed on appeal, 163 F. 2d 695.

11. That after all criminal indictments had been removed, he was apprehended and removed to Ellis Island for deportation, after having spent approximately 4½ years in jail by virtue of the two criminal indictments.

12. That he was a party to the case of *Citizens Protective League* v. *Clark*, 155 F. 2d 290, 291; cert. denied 329 U. S. 787.

13. That petitioner was in confinement for approximately six years.

14. That he married his wife, an American citizen, on

Nov. 17, 1936, and that one child was born of said marriage June 12, 1940.

15. That since entry into America, he has never returned to Germany.

It must go without argument that the foregoing allegations comprise the bulk of the petition and affidavit, and which the Government should concede to be correct, in that the facts are for the most, *a matter of record.* The only other phases of the petition and affidavit that would be subject to inquiry and as respondent now seeks are as follows:

16. That at petitioner's request, counsel appointed to defend him in the New York District Court promised to assist him in the New Jersey cancellation proceedings, but apparently failed to do so.

17. That petitioner had written and addressed a letter to the American Civil Liberties Union of New York for legal assistance in connection with his citizenship case and that the letter was taken from him at the time of his arrest by agents of the Federal Bureau of Investigation.

18. That he had been working on a draft of an answer to the complaint at the time of arrest, but was unable to complete the same.

19. That he was in poor financial condition, and was unable to obtain legal assistance due to then existing conditions and war hysteria.

The fact that petitioner could not retain an attorney in the citizenship case nor raise the required bond fee in the criminal case, and the fact the Court had to appoint counsel to defend him in said criminal case is indicative of the fact that petitioner's finances had been depleted, and we again reiterate, it has never been denied that petitioner drafted a letter to the Civil Liberties Union of New York which had been removed from his possession; that he had

attempted to draft an answer to the complaint, or that he had requested assistance from counsel appointed in the criminal case in New York City, to look into his citizenship case, and the record shows that nothing was done with reference to it, but we go further and state, there was no duty whatsoever, upon counsel appointed by the District Court in New York to represent petitioner in any matter other than the criminal proceeding in New York, and which he did. All the allegations enumerated in the petition were contained in the appendix and were fully elaborated on in argument and in the brief, and respondent had prior opportunities to answer petitioner's allegations but failed to do so. Now, after a period of two years, for respondent to raise a doubt at this time as to the verity of the allegations in the petition is most certainly not timely. Petitioner refers to P. 10 of respondent's motion concerning Mr. Justice Burton's concurrence resting "on the special circumstances here shown on behalf of this petitioner" that respondent indicates it would seem to refer to the whole body of facts set forth in the petition and not merely to the formal facts of record and to the undeniable fact of imprisonment. Respondent seems to forget there are other undeniable facts contained in the petition other than imprisonment. Has not the respondent by silence conceded that the authorities had full and complete knowledge of petitioner's removal from New Jersey to New York, his incarceration, and the fact he being held under a bond of $25,000.00 in New York City at the time the default judgment was entered? The foregoing question has been raised time and time again in the petition for certiorari and petitioner's brief, and remains unanswered. On page 11, of petitioner's brief it is stated:

> "We have reason to believe that there *may be additional facts*, which were not in the record and hence could not be mentioned in this Court, *which might have a substantial bearing on the verity of petitioner's allegation purporting to show that he was prevented from contesting the denaturalization complaint.*"

Petitioner respectfully asks, what are the additional facts which *might* have a bearing on the verity of petitioner's allegations? If respondent has in its possession any such facts concerning the verity of petitioner's allegations, why has there been a period of silence for two years? The Court's attention is called to the use of words in the foregoing quote "that there *may* be additional facts * * * * which *might* have a substantial bearing * * * *.

We are at a loss to understand why respondent objects to petitioner having a hearing of the case on the merits. We are confident, in the light of the cases, *Schneiderman* v. *United States*, 320 U. S. 118; *Baumgartner* v. *United States*, 322 U. S. 65, and the dissenting opinion in *Knauer* v. *United States*, 328 U. S. 654 and many other supporting authorities, that after such hearing on the merits, there should be a favorable determination for petitioner.

It is most respectfully urged that the present motion is just one further obstacle presented in an effort to preclude petitioner from a hearing on the merits, and to have that opportunity guaranteed all American citizens, namely, his day in Court, and that is all he asks.

We accordingly submit the Motion should be denied and dismissed, and August Klapprott afforded a trial on the merits in conformity with the opinion of this Honorable Court.

Respectfully submitted,

P. Bateman Ennis
Shoreham Building
Washington, D. C.

W. Clifton Stone
Shoreham Building
Washington, D. C.

Morton Singer
135 Broadway,
New York, N. Y.

Counsel for Petitioner